

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In the Matter of Protest of:

CASE No. 2009-134

Chester Turf & Landscaping

Department of Transportation

IFB No. SB 10041

Rest Area/Welcome Center Grounds

Maintenance

For Lower State Regions 1 Through 7

POSTING DATE:

October 29, 2009

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Chester Turf & Landscaping (Chester). With this invitation for bids (IFB), the South Carolina Department of Transportation (SCDOT) attempts to procure grounds maintenance for interstate rest areas and welcome centers. Chester submitted a bid, which SCDOT rejected due to the absence of bid security that was required of the bidders. In its letter, Chester protested SCDOT's rejection of its bid as nonresponsive alleging that its bid "is the rightful winning bid to regions 3-Orangeburg, Region 5-Dillon, and Region 7-Jasper. I believe that SCDOT has lost or misplaced the certified check that had to accompany our bid and awarded to another company because they did not have the check."

In order to resolve the matter, the CPO conducted a hearing October 19, 2009. Appearing before the CPO were Chester, represented by Greg Delleney, Esq.; Landscape & Mower, represented by Chris Henson and Darell Kee; Traxler's Lawn Care, represented by Donna and Tim Traxler; and SCDOT, represented by Amanda Taylor, Esq.

NATURE OF PROTEST

The letter of protest is incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On May 5, 2009, SCDOT issued the IFB. [Ex. 1]
2. On May 19, 2009, SCDOT conducted a pre-bid conference.
3. On May 22, 2009, SCDOT issued Amendment # 1. [Ex. 2]
4. On May 26, 2009, SCDOT issued Amendment # 2. [Ex. 3]
5. On June 4, 2009, SCDOT opened bids. [See Ex. 4 for the bid opening bid tabulation]
6. On August 31, 2009, SCDOT posted an intent to award notifying bidders of its intent to award contractors as follows:

Regions 1, 2, 3, 4
Regions 5, 7
Region 6

Traxler's Lawn Care
Landscaping and Mower
John Fowler's Lawn Care

CONCLUSIONS OF LAW

In its instructions to offerors, SCDOT required, "BID BOND – Your offer must include either a bid bond issued by a surety or sureties licensed in South Carolina or a certified check. The amount of the surety shall be five percent (5%) of the total bid amount. This bid bond penalty may be expressed in terms of a percentage of the bid price or may be expressed in dollars and cents. If a certified check is submitted in lieu of a bid bond, it must be made payable to the SCDOT." [Ex. 1, p. 11, Instructions to Offerors – B. Special Instructions]

SCDOT found that Chester failed to enclose the required bid security. Therefore, SCDOT rejected Chester's bid as nonresponsive.

The South Carolina Consolidated Procurement Code (the Code) requires, "notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids must be given by posting the notice at a location

specified in the invitation for bids.” [S.C. Code Ann. § 11-35-1520(10)] The Code defines a responsive bidder as, “a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.” [S.C. Code Ann. § 11-35-1410(7)] In general, the State Budget and Control Board Regulation 19-445.2070(F) provides, “[w]hen a bid security is required and the bidder fails to furnish it in accordance with the requirements of the invitation for bids, the bid shall be rejected.”

Chester contends that it submitted a cashier’s check in the amount of \$12,800, but that SCDOT lost or misplaced it. A copy of the cashier’s check was accepted into evidence. [Ex. 10] Melanie Edwards of Chester testified that she and her husband Wayne Edwards had enclosed the cashier’s check in Chester’s bid and paper clipped it to the front of the bid package. She further testified that she watched a lady (a SCDOT employee) take the paperclip (and check) off and set it down at the bid opening. Specifically, she stated that she saw her take the check off the bid package. (Mr. Edwards was not present at the opening.) Ms. Edwards stated that she “was absolutely sure” the check was with the bid package.

SCDOT disagrees. Margaret Oswald, SCDOT Procurement Officer, testified regarding the SCDOT’s bid opening procedures. She stated that she participated in this bid opening and that Chester’s check was not in the bid when she read it. Sandra Suber, of the SCDOT staff, also testified to the SCDOT bid opening procedures. She stated that she participated in this bid opening as the bid clerk and that she does not recall whether Chester enclosed a cashier’s check with its bid or not, but she believes she could not have misplaced it. Rudy Cabot, SCDOT Contract Services Manager, testified that he attended the bid opening and that he double-checked the Chester bid after bid opening, but found no bid security. He stated that he looked through each page and on the floor. He stated further

that he recalled seeing two checks that were on the top of their bids, but that he was certain the checks were not Chester Turf's." He also testified that no paperclips were removed at the opening.

DETERMINATION

The case is a matter of he said; she said. Chester claims that it included a certified check with its bid as bid security. SCDOT says it did not. Ms. Edwards contends the check was included with Chester's bid. She provided a copy of the certified check as evidence. SCDOT officials deny this.

The CPO queried Ms. Edwards regarding the lady that took her check off the bid, but Ms. Edwards could not describe her. Except that she had "white hands", Ms. Edwards could not provide any further description.

Chester contends that the copy of the check proves that it was included with its bid. However, it only supports Chester's contention that it acquired a cashier's check; not that Chester enclosed it with the bid.

Based on the evidence presented, the CPO finds that no check was submitted by Chester. Therefore, the protest must be denied.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

October 29, 2009

Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2008 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).